In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-115

MARY STEWART POWELL, PETITIONER

v.

WILLIAM K. ROGERS, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT WILLIAM K. ROGERS IN OPPOSITION

The issue presented is whether in a state which does not recognize common law marriage a woman, who had lived with a man knowing that they were not legally married, is entitled to widow's benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*

1. Petitioner lived with Amadee Powell from 1955 until 1969, when Mr. Powell was fatally shot during the course of his employment (Pet. App. I, p. 2). At the time the couple began living together Mr. Powell was married to another woman. Although he divorced his wife in 1965, he and petitioner never married. They spent their entire time together in California, except for a three-month vacation in Nevada (*ibid.*).

The couple had three children, and on each birth certificate the father was listed as Amadee Powell and the mother as Mary Stewart (Ct. App. Rec. 46-47). Although they filed joint state and federal tax returns, these returns were signed by Mr. Powell, with no signature in the space provided for "Spouse's signature" (Ct. App. Rec. 52). Mr. Powell's death certificate lists his marital status as "Single" (Ct. App. Rec. 64, 71).

After Mr. Powell's death, petitioner filed an application for death benefits for herself and her three children pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*[1] The insurance carrier stipulated to the children's entitlement, but contested petitioner's; consequently a hearing was held to determine whether petitioner was the widow of Amadee Powell within the meaning of the Act. The Deputy Commissioner, respondent William K. Rogers, held that since the couple had never been ceremonially married, nor had cohabited in a state which recognized common law marriage, petitioner does not qualify as the widow of Amadee Powell (Pet. App. III). The district court and court of appeals affirmed (Pet. Apps. I and II).

ARGUMENT

33 U.S.C. 902 provides in pertinent part:

> (16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

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[1]Under the Act a representative of the Deputy Commissioner holds a hearing to determine a plaintiff's entitlement. 33 U.S.C. 919. That decision is then subject to judicial review in which the Deputy Commissioner is named a statutory respondent. 33 U.S.C. 921. Since the proceeding in this case, the statute has been amended to provide administrative review by a Benefits Review Board followed by direct review in a court of appeals. Pub. L. 92-576, 86 Stat. 1261-1262 (Oct. 27, 1972), 33 U.S.C. (Supp. II) 921.

Petitioner contends that she fits within this statutory definition because she was dependent upon the deceased and had established a long and stable relationship with him.[2] The statutory standard of dependency, however, modifies the word "wife" and does not create an additional basis for establishing widowhood. Thus, under the Act, the determination of whether a woman is a widow is contingent upon whether she was a wife, and this is determined under local law. *Bolin* v. *Marshall*, 76 F. 2d 668 (C.A. 9), certiorari denied, 296 U.S. 573. Consequently, where a "common law" marriage is not possible under state law, a "common law wife" is not entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act as the deceased employee's widow. *Bolin* v. *Marshall*, *supra*. In the instant case, neither California nor Nevada, the two states in which the couple lived together, recognizes common law marriage. Cal. Civil Code, 4100 (West 12A); 5 Nev. Rev. Stat. 122.010.

Petitioner's reliance on *Thompson* v. *Lawson*, 347 U.S. 334, for the proposition that a "conjugal nexus" is sufficient to establish statutory entitlement, is misplaced. In *Thompson* this Court held that the abandoned legal wife of the deceased employee was *not* entitled to widow's benefits under the Act since she was not dependent upon him for support nor living apart from him for justifiable cause or by reason of his desertion. Thus, although his legal wife, she did not fit within the statutory criteria. *A fortiori*, where claimant is not even the legal wife, she cannot meet the statutory definition.

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[2]Pursuant to 33 U.S.C. 909(b), the combined widow's and children's benefits cannot exceed 66 2/3% of the deceased employee's wages. Mr. Powell's three children were awarded benefits totalling 65% of his weedly wage (Pet. App. III, p.3). Accordingly, petitioner is seeking only 1 2/3% of Mr. Powell's wage.

2. Finally, there is no merit to the argument that because petitioner is black and was dependent on the decedent her entitlement to widow's benefits should be based solely on dependency rather than on whether she was legally married, as required by the Act. Under the controlling definitional sections of the Act, dependency, in the absence of a legally recognizable husband-wife relationship, is not a sufficient basis for the award of widow's benefits.

Nor is there any constitutional infirmity in conditioning workmen's compensation benefits for a person claiming to be a spouse on the existence of a legally recognizable marriage. Such persons, unlike illegitimate children, can bring their relationship under the protection of the law by marrying. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 170; *Glona* v. *American Guarantee Co.*, 391 U.S. 73, 81 n. 9 (Harlan, J., dissenting). The instant case is thus, also, fundamentally unlike *Jimenez* v. *Weinberger*, No. 72-6609, decided June 19, 1974. In that case the Court struck down a provision of the Social Security Act which granted or denied benefits to dependent illegitimate children on the basis of their right to inherit under state law. The Court found that the distinction bore no rational basis to the scheme of the statute (slip op. pp. 7-9). Here, Congress in extending benefits to widows reasonably insisted that, as a first requisite, they be persons married to the decedent—by whatever form of marriage the state law (which governs marriage) permits. A widow, unlike a child, is only related to the decedent through the operation of law. It is thus rational for Congress to require such a nexus, and not simply dependency, as a requisite for receiving benefits under the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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